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 LMC Enterprises dba Flo-Kem, Inc.

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

OUR CLEAN WATERS, a non-profit
 corporation,

Plaintiff,

v.

LMC ENTERPRISES dba Flo-Kem,
 Inc., a California corporation,

Defendant.

Case No.: 2:17-cv-8149

**[PROPOSED] CONSENT
 DECREE**

Complaint Filed: 11/8/17

CONSENT DECREE

This Consent Decree ("Consent Decree") is entered into between Our Clean Waters ("OCW") and LMC Enterprises dba Flo-Kem, Inc. ("Flo-Kem") (all parties collectively are referred to as the "SETTLING PARTIES") with respect to the following facts and objectives:

RECITALS

WHEREAS, OCW is a 501(c)(3) non-profit, public benefit corporation organized under the laws of the State of California, dedicated to working with communities to improve the social and natural environment.

WHEREAS, Flo-Kem leases and operates a facility located at 19402 South Susana Road, Rancho Dominguez, CA 90221 (the "Facility"). Through June 30,

1 2015, the Facility has operated pursuant to State Water Resources Control Board
2 Water Quality Order No. 97-03-DWQ, National Pollutant Discharge Elimination
3 System General Permit No. CAS000001, Waste Discharge Requirements for
4 Discharges of Storm Water Associated with Industrial Activities Excluding
5 Construction Activities. Beginning on July 1, 2015, the Facility has operated
6 pursuant to State Water Resources Control Board Water Quality Order No. 2014-
7 0057-DWQ, National Pollutant Discharge Elimination System General Permit No.
8 CAS000001 (hereinafter "General Permit"). A map of the Facility is attached
9 hereto as Exhibit A and incorporated by reference;

10 **WHEREAS**, on or about August 10, 2017, OCW provided Flo-Kem with a
11 Notice of Violations and Intent to File Suit ("60-Day Notice Letter") under Section
12 505 of the Federal Water Pollution Control Act (the "Act" or "Clean Water Act"),
13 33 U.S.C. § 1365;

14 **WHEREAS**, on November 8, 2017, OCW filed its Complaint in the United
15 States District Court for the Central District of California (Our Clean Waters v.
16 LMC Enterprises dba Flo-Kem, Inc. ("Flo-Kem") Case No. 2:17-cv-8149. A true
17 and correct copy of the Complaint, including the 60-Day Notice Letter, is attached
18 hereto as Exhibit B and incorporated by reference;

19 **WHEREAS**, Flo-Kem denies any and all of OCW's claims in its 60-Day
20 Notice Letter and Complaint;

21 **WHEREAS**, OCW and Flo-Kem, through their authorized representatives
22 and without either adjudication of OCW's claims or admission by Flo-Kem of any
23 alleged violation or other wrongdoing, have chosen to resolve in full OCW's
24 allegations in the 60-Day Notice Letter and Complaint through settlement and avoid
25 the cost and uncertainties of further litigation; and

26 **WHEREAS**, OCW and Flo-Kem have agreed that it is in their mutual interest
27 to enter into this Consent Decree setting forth the terms and conditions appropriate
28 to resolving OCW's allegations set forth in the 60-Day Notice Letter and Complaint.

1 **NOW, THEREFORE, IT IS HEREBY STIPULATED BETWEEN THE**
2 **SETTLING PARTIES AND IS HEREBY ORDERED AND DECREED BY THIS**
3 **COURT AS FOLLOWS:**

4 1. **Jurisdiction.** This Court has jurisdiction over the subject matter of this
5 action pursuant to Section 505(a) of the Clean Water Act, 33 U.S.C. §135(a);

6 2. **Venue.** Venue is proper in the Central District of California pursuant
7 to Section 505(c)(1) of the Clean Water Act, 33 U.S.C. §1365(c)(1) because the Flo-
8 Kem facility is located within this District;

9 3. **Effective Date.** The term "Effective Date," as used in this Consent
10 Decree, shall mean the date that this Consent Decree is entered by the Court.

11 4. **Termination Date.** The term "Termination Date" as used in this
12 Consent Decree, shall mean June 30, 2019.

13 5. **Stipulation to Dismiss and [Proposed] Order.** Within ten (10)
14 calendar days of the Agency Approval Date, as defined in Paragraph 23 below,
15 OCW shall file a Stipulation to Dismiss and [Proposed] Order thereon pursuant to
16 Federal Rule of Civil Procedure 41(a)(2) with the United States District Court for
17 the Central District of California ("District Court"), with this Consent Decree
18 attached and incorporated by reference, specifying that OCW is dismissing with
19 prejudice all claims in OCW's Complaint.

20 **COMMITMENTS OF FLO-KEM**

21 6. **Compliance with General Permit.** Flo-Kem agrees to operate the
22 Facility in compliance with the applicable requirements of the General Permit and
23 the Clean Water Act.

24 7. **Implemented Storm Water Controls.** Flo-Kem shall maintain in
25 good working order all storm water collection systems at the Facility currently
26 installed or to be installed pursuant to this Consent Decree, including but not limited
27 to, existing housekeeping measures.
28

1 8. **Additional Structural Best Management Practices.** By the Effective
2 Date, Flo-Kem shall implement the following structural best management practices
3 ("BMPs") to improve the storm water pollution prevention measures at the Facility:

4 (a) Assure that the sections of the Facility identified on Exhibit A
5 have been paved with asphalt in a sufficient manner to allow for the cleaning of the
6 surface;

7
8 (b) Purchase an industrial sweeper to sweep the facility and
9 implement procedures to sweep weekly and, to the extent feasible, prior to
10 oncoming storms;

11 (c) Assure that all forklifts maintained by the company at the
12 Facility have low-zinc tires (i.e. tires with less than 2.1% zinc) as represented by the
13 tire dealer or manufacturer of the tires;

14
15 (d) Maintain at least 12 each, 4" x 72" weighted zeolite wattles at
16 the facility and distribute them in the flow paths of storm water run-off prior to
17 oncoming storms.

18 9. **Confirmation of New Structural BMPs.** Within 30 days of the
19 Effective Date, Flo-Kem shall confirm to OCW the installation of the measures
20 described above in Paragraph 8.
21

22 10. **Monitoring of Storm Water Discharges.** Flo-Kem shall collect and
23 analyze storm water discharges from the Facility in accordance with the General
24 Permit and this Consent Decree for, at a minimum, pH, total suspended solids, oil
25 and grease, nitrate + nitrite as nitrogen, and zinc.

26 11. **Monitoring Results.** Results from the Facility's sampling and analysis
27 during the term of this Consent Decree shall be uploaded to the State Water
28

1 Resources Control Board's ("State Board") Storm Water Multiple Application and
2 Report Tracking System ("SMARTS") in accordance with the requirements of the
3 General Permit.

4
5 12. **Additional Measures.** If the Facility's storm water sampling results
6 during the 2017-2018 and/or 2018-2019 reporting years indicate that the average of
7 the analytical results for a particular parameter indicates that storm water discharges
8 from the Facility exceed the annual NALs (as set forth in the General Permit) or if
9 two or more analytical results from samples taken for any parameter within the
10 2017-2018 or 2018-2019 reporting years exceed the instantaneous maximum NAL,
11 Flo-Kem agrees to take responsive actions to improve its storm water management
12 practices to address exceedances of the NAL attributable to its industrial sources,
13 including re-evaluating its structural and non-structural BMPs and considering
14 implementing additional BMPs aimed at reducing levels observed in storm water
15 samples.

16 13. **Amendment of Storm Water Pollution Prevention Plan**
17 **("SWPPP").** By sixty (60) days after the Effective Date, Flo-Kem shall have
18 amended the Facility's SWPPP to incorporate all changes, improvements, sample
19 log forms, and best management practices set forth in or resulting from this Consent
20 Decree. Flo-Kem shall ensure that all maps, tables, and text comply with the
21 requirements of the General Permit. Flo-Kem shall ensure that the SWPPP
22 describes all structural and non-structural BMPs and details the measures to be
23 installed.

24
25 14. **Mitigation Payment.** In recognition of the good faith efforts by Flo-
26 Kem to comply with all aspects of the General Permit and the Clean Water Act, and
27 in lieu of payment by Flo-Kem of any penalties, which have been disputed but may
28 have been assessed in this action if it had been adjudicated adverse to Flo-Kem, the

1 SETTling PARTIES agree that Flo-Kem will pay the sum of \$21,500.00_ to OCW
2 for the purpose of providing environmentally beneficial projects relating to water
3 quality improvements in the Los Angeles River Reach 2 watershed. Payment shall
4 be to mailed to Levitt Law, APC as follows: 311 Main Street, #8, Seal Beach, CA
5 90740. Payment shall be made by Flo-Kem to OCW within ten (10) calendar days
6 of the District Court's entry of the Order dismissing the action described in
7 Paragraph 2 of this Consent Decree. Flo-Kem shall copy OCW with any
8 correspondence.

9
10 15. **Fees, Costs, and Expenses.** As reimbursement for OCW's
11 investigative, expert and attorneys' fees and costs, Flo-Kem shall pay OCW the sum
12 of Seventeen Thousand Five Hundred(\$17,500). Payment shall be made by Flo-
13 Kem within thirty (30) calendar days of the District Court's entry of the Order
14 dismissing the action described in Paragraph 2 of this Consent Decree. Payment by
15 Flo-Kem to OCW shall be made in the form of a single check payable to "Levitt
16 Law," and shall constitute full payment for all costs of litigation, including
17 investigative, expert and attorneys' fees and costs incurred by OCW that have or
18 could have been claimed in connection with OCW's claims, up to and including the
19 District Court's entry of the Order.

20 16. **Review by Federal Agencies.** OCW shall submit this Consent Decree
21 to the U.S. EPA and the U.S. Department of Justice (hereinafter, the "Agencies") via
22 certified mail, return receipt requested, within five (5) days after the Effective Date
23 of this Consent Decree for review consistent with 40 C.F.R. § 135.5. The Agencies'
24 review period expires forty-five (45) days after receipt of the Consent Decree by
25 both Agencies, as evidenced by the return receipts and the confirming
26 correspondence of DOJ. In the event that the Agencies comment negatively on the
27 provisions of this Consent Decree, OCW and Flo-Kem agree to meet and confer to
28 attempt to resolve the issue(s) raised by the Agencies. If OCW and Flo-Kem are

1 unable to resolve any issue(s) raised by the Agencies in their comments, OCW and
2 Flo-Kem agree to expeditiously seek a settlement conference with the Magistrate
3 Judge assigned to this matter to resolve the issue(s). If the SETTLING PARTIES
4 cannot resolve the issue(s) through a settlement conference, this Consent Decree
5 shall be null and void. The date of (a) the Agencies' unconditioned approval of this
6 Consent Decree, (b) the expiration of the Agencies' review period, or (c) the
7 SETTLING PARTIES' resolution of all issues raised by the Agencies, whichever is
8 earliest, shall be defined as the "Agency Approval Date."

9
10 17. **No Admission or Finding.** This Consent Decree nor any payment
11 pursuant to the Consent Decree nor compliance with this Consent Decree shall
12 constitute evidence or be construed as a finding, adjudication, or acknowledgment
13 of any fact, law or liability, nor shall it be construed as an admission of violation of
14 any law, rule or regulation. However, this Consent Decree may constitute evidence
15 in actions seeking compliance with this Consent Decree. Evidence of the payment
16 amount may be used to enforce the payment provisions of this Consent Decree.

17 18. **Mutual Release of Liability and Covenant Not to Sue.** In
18 consideration of the above, and except as otherwise provided by this Consent
19 Decree, the SETTLING PARTIES hereby fully release each other and their
20 respective parents, affiliates, subsidiaries, divisions, insurers, successors, assigns,
21 and current and former employees, attorneys, officers, directors, members,
22 shareholders, and agents from any and all claims and demands of any kind, nature,
23 or description whatsoever, known and unknown, and from any and all liabilities,
24 damages, injuries, actions or causes of action, either at law or in equity, which it
25 may presently have, or which may later accrue or be acquired by it, arising from the
26 Complaint or Notice Letters, including, without limitation, all claims for injunctive
27 relief, damages, penalties, fines, sanctions, mitigation, fees (including fees of
28 attorneys, experts, and others), costs, expenses or any other sum incurred or claimed

1 or which could have been claimed in the Complaint or Notice Letters, for the
2 alleged failure of Defendant to comply with the Clean Water Act at the Facility, up
3 to and including the Termination Date.

4
5 19. **1542 Acknowledgment.** The SETTLING PARTIES acknowledge that
6 they are familiar with section 1542 of the California Civil Code, which provides:

7 A general release does not extend to claims which the creditor does not
8 know or suspect to exist in his or her favor at the time of executing the
9 release, which if known by him or her must have materially affected his
10 or her settlement with the debtor.

11 The SETTLING PARTIES hereby waive and relinquish any rights or benefits
12 they may have under California Civil Code section 1542 with respect to any other
13 claims against each other arising from, or related to, the allegations and claims as set
14 forth in the 60-Day Notice Letter and Complaint at the Facility up to and including
15 the Termination Date of this Consent Decree.

16 20. **No Further Actions.** For the period beginning on the Effective Date
17 and ending on the Termination Date, neither OCW, nor its officers, executive staff,
18 members of its Steering Committee or counsel will bring any enforcement action or
19 pursue or take any action with respect to any statutory or common law claim, to the
20 full extent that any of the foregoing were or could have been asserted by OCW
21 against Flo-Kem or the RELEASEES in the Complaint, the Notice, or covered by
22 this AGREEMENT, except as provided for in this AGREEMENT nor will they file
23 or support other lawsuits, by contacting, providing financial assistance or personnel
24 time or taking any other affirmative actions, against or relating to the Facility by
25 other groups or individuals who would rely upon the citizen suit provision of the
26 Clean Water Act or any other statutory or common law claim, to challenge the
27 Facility's compliance with the Clean Water Act, or the General Permit.

28

1 21. **Releases.** This AGREEMENT is a final and binding resolution
2 between Plaintiff, on his own behalf, and on behalf of the public and in the public
3 interest, and Flo-Kem, and each of their respective parents, affiliates, subsidiaries,
4 divisions, insurers, successors, assigns, and current and former employees,
5 attorneys, officers, directors, members, shareholders, and agents ("RELEASEES")
6 regarding the matters addressed in this AGREEMENT and shall have preclusive
7 effect such that no other person or entity, whether purporting to act in his, her or its
8 interests or the public interest shall be permitted to pursue and/or take action with
9 respect to any violation of the CWA that was alleged in the Complaint, that could
10 have been brought pursuant to the Notice or that is addressed by this AGREEMENT

11 22. **Dispute Resolution Procedures.** Except as specifically noted herein,
12 any disputes with respect to any of the provisions of this Consent Decree shall be
13 resolved through the following procedure. The SETTLING PARTIES agree to first
14 meet and confer in good faith to resolve any dispute arising under this Consent
15 Decree. In the event that such disputes cannot be resolved through this meet and
16 confer process, the SETTLING PARTIES agree to request a settlement meeting
17 before the Magistrate Judge assigned to this action. In the event that the
18 SETTLING PARTIES cannot resolve the dispute by the conclusion of the
19 settlement meeting with the Magistrate Judge, the SETTLING PARTIES agree to
20 submit the dispute via motion to the District Court.

21 **GENERAL PROVISIONS**

22 23. **Force Majeure.** Flo-Kem will notify OCW if timely implementation
23 of Flo-Kem's respective duties under this Consent Decree becomes impossible due
24 to circumstances beyond the control of Flo-Kem or its agents, and which could not
25 have been reasonably foreseen and prevented by the Flo-Kem's exercise of due
26 diligence. Any delays due to Flo-Kem's respective failure to make timely and bona
27 fide applications and to exercise diligent efforts to comply with the terms in this
28

1 Consent Decree will not, in any event, be considered to be circumstances beyond the
2 Flo-Kem's control.

3 (a) If Flo-Kem claims impossibility, it will notify OCW in writing
4 within twenty (20) business days of the date that Flo-Kem discovers the event or
5 circumstance that caused or would cause non-performance with the terms of this
6 Consent Decree, or the date that Flo-Kem should have known of the event or
7 circumstance by the exercise of due diligence. The notice must describe the reason
8 for the non-performance and specifically refer to this section of this Consent Decree.
9 The notice must describe the anticipated length of time the non-performance may
10 persist, the cause or causes of the non-performance, the measures taken or to be
11 taken by Flo-Kem to prevent or minimize the non-performance, the schedule by
12 which the measures will be implemented, and the anticipated date of compliance.
13 Flo-Kem will adopt all reasonable measures to avoid and minimize such non-
14 performance.
15

16 (b) The SETTLING PARTIES will meet and confer in good faith
17 concerning the non-performance and, if the SETTLING PARTIES concur that
18 performance was or is impossible, despite the timely good faith efforts of Flo-Kem,
19 due to circumstances beyond the control of Flo-Kem that could not have been
20 reasonably foreseen and prevented by the exercise of due diligence by Flo-Kem,
21 new performance deadlines will be established.

22 (c) If OCW disagrees with Flo-Kem's notice, or in the event that the
23 SETTLING PARTIES cannot timely agree on the terms of new performance
24 deadlines or requirements, either SETTLING PARTY may invoke the dispute
25 resolution process described in Paragraph 22 of this Consent Decree. In such
26 proceeding, Flo-Kem will bear the burden of proving that any delay in performance
27
28

1 of any requirement of this Consent Decree was caused or will be caused by force
2 majeure and the extent of any delay attributable to such circumstances.

3
4 24. **Construction.** The language in all parts of this Consent Decree shall
5 be construed according to its plain and ordinary meaning, except as to those terms
6 defined by law, in the General Permit, and the Clean Water Act or specifically
7 herein.

8 25. **Choice of Law.** This Consent Decree shall be governed by the laws of
9 the United States, and where applicable, the laws of the State of California.

10 26. **Severability.** In the event that any provision, section, or sentence of
11 this Consent Decree is held by a court to be unenforceable, the validity of the
12 enforceable provisions shall not be adversely affected.

13
14 27. **Correspondence.** All notices required herein or any other
15 correspondence pertaining to this Consent Decree shall be sent by regular, certified,
16 overnight mail, or e-mail as follows:

17 If to OCW:

Copy to:
Scott L. Levitt, Esq.
LEVITT LAW, APC
311 Main Street, Suite #8
Seal Beach, CA 90740
(562) 493-7548

18
19
20 If to Flo-Kem:
21 John Grimes
22 LMC Enterprises d/b/a Flo-Kem
23 19402 South Susana Road
24 Rancho Dominguez, CA 90221

Copy to:
Albert M. Cohen
acohen@loeb.com
Loeb & Loeb LLP
10100 Santa Monica Boulevard
Suite 2200
Los Angeles, CA 90067
(310) 282-2228

25 Notifications of communications shall be deemed submitted on the date that
26 they are e-mailed, postmarked and sent by first-class mail or deposited with an
27 overnight mail/delivery service. Any change of address or addresses shall be
28 communicated in the manner described above for giving notices.

1 28. **Counterparts.** This Consent Decree may be executed in any number
2 of counterparts, all of which together shall constitute one original document.
3 Telecopied, scanned (.pdf), and/or facsimiled copies of original signature shall be
4 deemed to be originally executed counterparts of this Consent Decree.

5 29. **Assignment.** Subject only to the express restrictions contained in this
6 Consent Decree, all of the rights, duties and obligations contained in this Consent
7 Decree shall inure to the benefit of and be binding upon the SETTLING PARTIES,
8 and their successors and assigns.

9 30. **Modification of the Agreement.** This Consent Decree, and any
10 provisions herein, may not be changed, waived, discharged or terminated unless by
11 a written instrument, signed by the SETTLING PARTIES.
12

13 31. **Full Settlement.** This Consent Decree constitutes a full and final
14 settlement of this matter. It is expressly understood and agreed that the Consent
15 Decree has been freely and voluntarily entered into by the SETTLING PARTIES
16 with and upon advice of counsel.
17

18 32. **Integration Clause.** This is an integrated Consent Decree. This
19 Consent Decree is intended to be a full and complete statement of the terms of the
20 agreement between the SETTLING PARTIES and expressly supersedes any and all
21 prior oral or written agreements covenants, representations and warranties (express
22 or implied) concerning the subject matter of this Consent Decree.

23 33. **Authority.** The undersigned representatives for OCW and Flo-Kem
24 each certify that he/she is fully authorized by the party whom he/she represents to
25 enter into the terms and conditions of this Consent Decree.
26

27 37. **Continuing Jurisdiction.** This Court shall retain jurisdiction to
28 enforce the terms of the Consent Decree.

1 The SETTLING PARTIES hereby enter into this Consent Decree, Order and
2 Final Judgment and submit it to the Court for its approval and entry as a final
3 judgment,

LMC Enterprises dba Flo-Kem, Inc.	WATERS
By: <u>[Signature]</u>	By: <u>[Signature]</u>
Name: <u>COO</u>	Name: <u>Laura Melder, pour Clean Waters</u>
Title: <u></u>	Title: <u>Executive Director</u>
Date: <u>11/8-2017</u>	Date: <u>11/6/17</u>
APPROVED AS TO FORM:	
For: Defendant	For: Plaintiff
LOEB & LOEB LLP	LEVITT LAW
By: <u>[Signature]</u>	By: <u>[Signature]</u>
Name: <u>Albert M. Cohen</u>	Name: <u>Scott L Levitt</u>
Date: <u>11/8/17</u>	Date: <u>11/6/17</u>

13
14 **IT IS SO ORDERED.**

15 Date: _____

16 _____
17 Honorable
18 United States District Court Judge
19 Central District of California
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CERTIFICATE OF SERVICE

I certify that on 11/9/17 I caused the foregoing **CONSENT DECREE** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notifications of such filings to all parties.

DATED: 11/9/17

LOEB & LOEB LLP

By: /s/ Albert M. Cohen